Supreme Court, U.S.
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No. 91-1105

In The

Supreme Court of the United States

October Term, 1991

THE CIT GROUP/EQUIPMENT FINANCING INC., NELSON G. EVENSON, ELFRIEDA EVENSON, JAMES A. BRUNDAHL, BERNADETTE BRUNDAHL,

Petitioners,

v.

VILLAGE OF GERMANTOWN, WISCONSIN,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

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QUESTIONS PRESENTED

1. Do the petitioners present sufficient "special and important reasons" to justify granting their petition?

2. Were Germantown's assessments reasonable and did they fulfill the Wisconsin statutory standards for a municipality proceeding under its police power so as to comply with the Fourteenth Amendment's due process clause?

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STATEMENT ON JURISDICTION

The Wisconsin Court of Appeals issued its decision on May 22, 1991, and the Wisconsin Supreme Court denied a petition for review on October 8, 1991. The Court of Appeals' decision was published in the following case: *CIT Group v. Village of Germantown*, 163 Wis. 2d 426, 471 N.W.2d 610 (Ct. App. 1991).

28 U.S.C. sec. 1257(a) provides the grounds on which the jurisdiction of this Court is sought to be invoked by the petitioners. 28 U.S.C. sec. 2403(b) is not applicable, contrary to the petitioners' statement.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

In addition to the Fourteenth Amendment of the United States Constitution which was cited by the petitioners, Article I, sec. 1 of the Wisconsin Constitution is involved:

> **Equality; inherent rights.** SECTION 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

The following Wisconsin statutes are involved: secs. 66.60(1), (2), (3), (7), (8), (11) and (12), and sec. 144.24(4)(b)3. All of them are contained in the Appendix. In addition, secs. NR 128.06(2) and NR 128.07 of the

Wisconsin Administrative Code are referenced, and they are also contained in the Appendix.

Finally, Germantown's Resolution No. 11-88 (dated March 21, 1988), is the document levying the special assessments at issue, and it is contained in the Appendix.

STATEMENT OF THE CASE

The material facts are set forth in the published opinion by the Wisconsin Court of Appeals:

> In 1981, a regional sewerage plan adopted by the Southeastern Wisconsin Regional Planning Commission, the Wisconsin Department of Natural Resources, and the United States Environmental Protection Agency required Germantown to abandon its existing wastewater treatment plant and build a sewer interceptor connecting Germantown to MMSD [Milwaukee Metropolitan Sewerage District]. Germantown lost a lawsuit challenging this requirement. Subsequently, Germantown was under a moratorium barring any new sewer connections until it complied with the plan.
>
> The projected cost of the total project was $22 million. [App. 22.] Increased sewer service charges covered $12 million of the debt. [App. 22.] The following funding plan was adopted for the remainder [App. 17, 21]:

1.	Wisconsin Fund Grant	$5,413,550
2.	Special Assessment of Property Adjacent to Interceptor	$ 275,193
3.	Reserve Capacity Assessment	$4,905,641

It is the reserve capacity assessment that is at issue in this appeal. However, the Wisconsin Fund Grant is relevant to the assessment.

The Wisconsin Fund Grant Program was established under sec. 144.24, Stats., and is regulated by Wis. Adm. Code sec. NR 128. Eligible costs for the grant are the costs necessary for an interceptor having a capacity to serve only existing users. *See* Wis. Adm. Code sec. NR 128.06(2). Any portion of the cost for a reserve capacity to serve future users cannot be covered with a grant from the fund. *See* Wis. Adm. Code sec. NR 128.07.

To determine the fundable costs, Germantown was required to determine the parallel cost ratio, which is the cost of the interceptor without a reserve capacity divided by the cost of the interceptor with a reserve capacity. *See id.* Germantown determined that the parallel cost ratio was 93.5%. This meant that 93.5% of the interceptor's cost was to serve existing users and was therefore eligible for the Wisconsin Fund's 60% funding grant.

After the grant, Germantown still needed to fund the 40% of the eligible cost not funded by the grant, the ineligible 6.5% of the cost attributed to the reserve capacity alone, and miscellaneous costs including interest. After levying a special assessment for properties adjacent to the interceptor and applying a small contingency fund to the project, Germantown passed a resolution invoking its police powers and levying the reserve capacity assessment on undeveloped property that was not connected to Germantown's sewer system by December 31, 1985. [App. 9 *et seq.*]

The reserve capacity assessment plan called for postponing the collection of the assessment until the property was developed. [App. 12, 13.] Only when a property was actually connected to the Germantown sewer system would an exact assessment be made by calculating the number of residential equivalency connections (REC) for the property. [App. 12, 13, 21.] The REC calculation would adjust commercial and industrial development to an equivalent residential use based on the average water consumption of a single family home. [App. 21.]

The assessment plan called for charging each REC $1000, subject to certain deductions, plus interest of 7% per year. [App. 13, 19.] To arrive at this amount for each future REC's assessment, Germantown projected a moderate growth rate of 125 RECs per year for twenty-seven years, even though the interceptor was designed to deal with an even greater growth rate. [App. 19.] The assumption of the moderate rate was based on recent growth trends and reduced population projections for southeastern Wisconsin. *CIT Group v. Village of Germantown*, 163 Wis. 2d 426, 431-433, 471 N.W.2d 610, 611-612. (Ct. App. 1991).

ARGUMENT

I. PETITIONERS DO NOT PRESENT ANY SPECIAL AND IMPORTANT REASONS FOR THE COURT TO GRANT THEIR PETITION.

A. The Wisconsin Court Of Appeals Did Not Decide An Important Question Of Federal Law Which Should Be Settled By This Court.

United States Supreme Court Rule 10.1 provides that review on writ of certiorari is a matter of judicial discretion and that a petition for a writ of certiorari will be granted only when there are special and important reasons for it. Petitioners have utterly failed to articulate any such reasons. Instead, they rely on implication. Something more is required, first to persuade this Court that important due process rights under the Fourteenth Amendment may have been violated, and second, that the possible violation is significant enough to review.

Petitioners do not challenge the validity of the statute under which Germantown levied the assessment; rather, they attack its application by Germantown (and subsequently the three levels of the Wisconsin courts which affirmed it). The effect of the assessment on the petitioners is not wide ranging, and based on this case's unique facts, its result is of limited significance. Obviously, the issue is of interest to the petitioners, but the question for the Court is whether it resonates broadly enough to justify review.

This Court addressed these considerations in *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1954). Although that case concerned a Fourteenth Amendment claim rendered

moot because of the corrective passage of a state statute, the Court's reasoning is illuminative:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted.] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. *Rice*, 349 U.S. at 74.

Petitioners acknowledge that the cases in this Court on special assessments are old, and consequently it appears that constitutional issues concerning special assessments have long been resolved. (Pet. 12.) Indeed, it is clear from the absence of any special assessment cases before this Court for a long time that these types of cases are adequately handled by the state courts. As will be discussed below, due process protections are contained in the Wisconsin statutes as interpreted by the Wisconsin courts.

B. The Decision Of The Wisconsin Court Of Appeals Does Not Conflict With Any Decision Of This Court.

Petitioners have cited no authority that the state court decision conflicts with any decision of this Court on a question of federal law. The only reference to questions

of federal law in the Wisconsin Court of Appeals' decision is in its conclusion that there was no taking of property in violation of either the state or federal constitution, nor was there a violation of the constitutional equal protection clauses since all future users were similarly treated by the assessment and it had a rational basis. *CIT Group*, 163 Wis. 2d at 437, 438, 471 N.W.2d at 614. It has long been settled that in the exercise of police power reasonable classifications are not violative of equal protection. *Zucht v. King*, 260 U.S. 174, 177 (1922).

Due process under the Fourteenth Amendment in assessment proceedings is one of state power, not of policy. It is a question of what the state must accord, not of what it may grant or withhold in its discretion. *St. Louis Land Co. v. Kansas City*, 241 U.S. 419 (1916). The power of a state in assessing for public improvements (and also the power of a municipality which is a political subdivision of a state) is constitutionally limited by the requirement that its exercise not be arbitrary. *Gast Realty & Investment Co. v. Schneider Granite Co.*, 240 U.S. 55 (1916); *Hancock v. Muskogee*, 250 U.S. 454 (1919); and *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U.S. 405 (1935).

Essentially, the petitioners argue that the state appellate court committed error in affirming the assessment. They contend, implicitly if not directly, that the Wisconsin Court of Appeals erroneously construed parts of sec. 66.60, Wis. Stats., Wisconsin's special assessment law. (*See* Pet. at 25-31, 36-37.) The argument is wrong, but even if it is not, by itself it fails to set forth a reviewable due

process claim. In guaranteeing due process, the Fourteenth Amendment does not assure immunity from judicial error, *Stein v. New York*, 346 U.S. 156 (1953), and a decision by a state court of last resort which amounts to an erroneous construction of statutes does not deny Fourteenth Amendment due process so as to be reviewable by this court. *Neblett v. Carpenter*, 305 U.S. 297 (1938). Something more is required, and the petitioners have failed to provide it.

Simply put, the petitioners do not show that the decision of the Wisconsin Court of Appeals conflicts with a decision of this Court on the question of due process. Thus, the petition lacks sufficient reasons for this Court to grant review.

II. THE DECISION OF THE WISCONSIN COURT OF APPEALS IS CONSISTENT WITH WISCONSIN LAW.

A. Special Assessments By Wisconsin Municipalities Must Comply With State And Federal Due Process Requirements.

Sec. 66.60(1), Wis. Stats., authorizes Wisconsin cities, towns and villages to levy special assessments upon property in a limited and determined area for special benefits conferred by municipal work or improvement. (App. 1.) Such assessments are required to be made on a reasonable basis. (App. 1.) Under sec. 66.60(7) and (8), Wis. Stats., a hearing must be held and notice thereof published and sent to every affected property owner at least ten days before the final hearing, and the final resolution

and notice of installment payments must also be published and mailed to property owners. (App. 2, 3.) Any aggrieved person may appeal the assessment within ninety days pursuant to sec. 66.60(12), Wis. Stats. (App. 4.)

Article I, sec. 1 of the Wisconsin Constitution is the substantial equivalent of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. *Estate of Wolff v. Weston Town Board*, 156 Wis. 2d, 588, 594, 457 N.W.2d 510, 512 (Ct. App. 1990). Due process is a flexible concept that requires procedural protections as the particular situation demands. *Id.*

Procedural fairness by itself is not enough, assessments under the police power must also be reasonable; in other words, they cannot be arbitrary. *Gelhaus & Brost, Inc. v. City of Medford*, 144 Wis. 2d 48, 52, 423 N.W.2d 180, 182 (Ct. App. 1988). Wisconsin courts zealously protect due process rights in special assessment cases. In *Peterson v. City of New Berlin*, 154 Wis. 2d 365, 453 N.W.2d 177 (Ct. App. 1990), the Wisconsin Court of Appeals overturned a sewer and water assessment because it was unreasonable. In that case, unequal assessments were levied against irregularly shaped lots on a front foot basis, but since all the lots benefited equally the Court concluded that a front foot assessment was unreasonable under those facts. *Id.* at 373, 453 N.W.2d at 181.

B. Germantown's Assessment Is Reasonable.

In Wisconsin, a municipality is responsible for determining the method or combination of methods used to levy special assessments. Sec. 66.60(1), Wis. Stats. (App. 1.) A particular assessment may involve a variety of different methods, such as a charge based upon assessed value, a charge based on a property's front footage or a lump sum assessment. The only requirement is that the method of assessment be reasonable under the existing circumstances. *Village of Egg Harbor v. Mariner Group*, 156 Wis. 2d 568, 572, 457 N.W.2d 519, 521 (Ct. App. 1990).

Germantown faced a difficult and complex situation in calculating a fair and equitable assessment. The sewer interceptor abuts few properties so a front foot assessment was clearly inappropriate. Much of the lands within the assessment district, which is Germantown's sewer service area, are undeveloped, and approximately three-fourths of such lands are zoned agricultural. Thus, a strict area assessment as proposed by the petitioners clearly is not fair and equitable. An area assessment without regard to projected growth and the location and type of the growth presented Germantown with an untenable choice: either it would force property owners to prematurely develop their lands simply to pay the assessments, or, if fixed assessments were deferred until development, collection of the necessary costs within the foreseeable future would never be realized because a considerable number of lands may never develop.

Besides special assessments, Germantown had two other sources of revenue available to it to finance the

sewer interceptor: general property taxes and sewer service charges. General property taxes were not justified because a relatively small portion of the land in Germantown is actually located within the assessment district, i.e. the year 2005 sewer service area.

Germantown financed part of the cost of the project with an increased sewer service charge. Each residential user, beginning in the first quarter of 1986, pays $236 per year towards the total MMSD connection project debt. [App. 18.] Thus, existing users will pay an estimated $12,596,520 towards the overall connection costs to the MMSD. [App. 22.] Also, existing users previously paid a $225 reserve capacity fee. [App. 20.] These facts, coupled with the important fact that existing users through past sewer user charges and special assessments had paid for the collector system that connects all users to the interceptor, convinced Germantown's Board that to levy a reserve capacity assessment against existing users for the interceptor would be unreasonable. Another consideration was the fact that Wisconsin Fund grants were made based on the existing users. (*See* NR sec. 128.06(2), Wis. Admin. Code; App. 20.)

Germantown had numerous factors to consider in deciding the allocation of its portion of the interceptor costs. The primary beneficiaries of the interceptor are new users, because without it Germantown still would be under a sewer moratorium. New users inherited a collection system paid for by past users. It would have been inequitable for Germantown to ignore the contributions of the existing (past) users and assess them on the same basis as new users.

The interceptor costs, seen in the context of the overall costs for connecting to the MMSD system, presented a unique situation requiring both imagination and creativity to come up with a fair assessment. In determining an assessment formula, the objective "is to equitably spread the cost of the project among the benefited properties. While the municipality should attempt to maintain consistency from project to project, old formulas should not be followed blindly. Each new project may involve special situations requiring new approaches." R. Klitzke and J. Edgar, *Wisconsin Special Assessments*, 62 Marq. L. Rev. 171, 195 (1978).

Germantown is not required to levy a perfect special assessment. In this case, a number of estimates and projections had to be made to deal with a complex situation. Municipalities must have necessary flexibility to deal realistically with questions which are not susceptible to exact measurement. Precise mathematical equality is not always feasible nor legally required. *Banberry Development Corporation v. South Jordan City*, 631 P. 2d 899 (Utah, 1981).

The interceptor project is essentially an expansion of Germantown's system. The manner by which Germantown chose to finance it is in accord with cases in other jurisdictions permitting the cost of expansion to be borne by new users. *See Downey v. Wells Sanitary District*, 561 A. 2d 174 (Me., 1989); *City of Arvada v. City and County of Denver*, 663 P. 2d 611 (Colo., 1983); *Banberry Development Corporation*, 631 P. 2d 899 (Utah, 1981).

Although the use of hook-up charges or assessments based upon residential equivalency to finance sewer construction are quite common in Wisconsin, *Village of Egg*

Harbor, 156 Wis. 2d at 568, is a case of first impression in Wisconsin. There the municipality assessed one residential equivalent unit (REU) against each parcel of property regardless of size or occupancy. Additional REUs were assessed against properties which would use over 300 gallons of water per day. The Wisconsin Court of Appeals upheld the assessment.

Germantown balanced the costs between the old and new users in a reasonable manner. Since a large part of the undeveloped lands is zoned agricultural, reasonableness requires that the assessment fairly apportion costs and not arbitrarily or capriciously burden any group of property owners. *CIT Group v. Village of Germantown*, 163 Wis. 2d at 437, 471 N.W.2d at 614. Germantown's REC (residential equivalency connection) calculation uses average residential water consumption as the common standard of measurement and thus fairly apportions the cost of the interceptor's reserve capacity. And, the RECs will not be calculated and payments on the assessments will not be due until a property is actually developed. *Id.*

Under all the circumstances, Germantown allocated the costs fairly and equitably and its assessment was made on a reasonable basis.

C. Germantown's Assessment In Unknown, But Determinable Amounts, Afforded Due Process.

Petitioners argue that Germantown's assessment method which levies an "unknown" assessment deprives them of due process. (Pet. at 12, *et seq.*) They further assert that the "fundamental axiom" of special assessments is to allocate the cost of the project among the

benefiting property owners in fixed amounts, citing *Spencer v. Merchant*, 125 U.S. 345, 356 (1888) and *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 338-339 (1901). (Pet. at 13 and 14.)

Spencer and *French* dealt with front foot assessments for street improvements benefiting all properties in a defined area. For Germantown, however, to levy assessments in fixed amounts upon agricultural lands which may never develop would not be fair and equitable, and open to legal challenge. In Wisconsin, due process requirements of reasonable assessments and fair apportionment of costs override any customary assessment method or so-called "fundamental axioms" of special assessments. *Peterson v. City of New Berlin*, 154 Wis. 2d at 372, 373, 453 N.W.2d at 181.

Petitioners cite *Cloverdale Foods Co. v. City of Mandan*, 364 N.W.2d 56 (N.D. 1985), noting that residential equivalency assessments were levied upon vacant lots. Significantly, however, Mandan's assessment plan also established a hook-up fee of an unknown but determinable amount as to unplatted lands and areas where immediate use could not be ascertained. *Id.* at 59. Thus, the assessment methods used by both Germantown and Mandan were based upon residential equivalency water use, but the circumstances of the two assessments differed in that it appears that most of Mandan was developed, platted and zoned for development while much of Germantown's sewer service area is zoned agricultural. And in both situations, where future use of land was undeterminable, the unknown but determinable assessments/ hook-up fees were deferred until development occurred. Due process is best served by this approach.

Petitioners also cite *American Oil Co. v. City of St. Cloud*, 206 N.W.2d 31 (Minn., 1973), and suggest that Germantown should have followed the St. Cloud assessment formula and levied an area assessment on all the property in the assessment district. As with Mandan's assessment method, St. Cloud's method seems reasonable under its particular facts. It levied a direct benefit assessment against properties abutting the main, and it levied an area assessment on all of the 500 indirectly benefited acres, apparently reasoning that those lands would develop in a relatively short time. But St. Cloud's approach is totally inappropriate for Germantown since much of the assessment district may never develop and the exact location and type of development was not determinable when the assessment was levied.

In both *Mandan* and *St. Cloud*, the state appellate courts carefully examined the reasonableness of the assessment methods under the respective facts and determined that the assessments were made in a fair and equitable manner. That is precisely what occurred with the Germantown assessment.

Germantown's estimate of 125 RECs per year was reasonable, and it was never rebutted by the Petitioners. If the estimate is exceeded, however, Wisconsin law provides for a reduction of the assessment and reimbursement to property owners who have already paid more than the amended assessment. *See* sec. 66.60(11), Wis. Stats. [App. 4], and *CIT Group*, 163 Wis. 2d at 437, 471 N.W.2d at 614.

Germantown could have made specific dollar assessments against vacant lands, but it chose not to. Under its

approach, the assessment against each parcel is determinable. The property owner decides when and how to develop his or her land. Based on the development decision by the property owner, Germantown then calculates the number of RECs per parcel based upon the assessment formula and multiplies each REC by $1,000 to arrive at the actual amount of the assessment. This approach eliminates inequities which would result from a specific amount being assessed at the outset. It is reasonable and thus affords due process.

CONCLUSION

The Fourteenth Amendment requires that (1) the owners of property subject to special assessments be given notice and an opportunity to be heard regarding benefits, and (2) the assessments be made on a reasonable basis and fairly and equitably apportion costs upon benefiting properties. Petitioners have clearly been afforded due process on both counts. The arguments presented by the petitioners in their petition were carefully considered by the Wisconsin Court of Appeals and rejected.

The Petition for a Writ of Certiorari to review the Wisconsin Court of Appeals' decision should be denied because it does not present any important reasons for review, and it requests this Court to review a decision which, in affirming Germantown's assessment as reasonable, is consistent with Wisconsin law. Petitioners failed

to persuade the Wisconsin Supreme Court to review this case and they have similarly failed before this Court.

Respectfully submitted,

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February 3, 1992

66.60 Special assessments and charges. (1)(a) Except as provided in sub. (6m), as a complete alternative to all other methods provided by law, any city, town or village may, by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon such property by any municipal work or improvement; and may provide for the payment of all or any part of the cost of the work or improvement out of the proceeds of such special assessments.

(b) The amount assessed against any property for any work or improvement which does not represent an exercise of the police power shall not exceed the value of the benefits accruing to the property therefrom, and for those representing an exercise of the police power, the assessment shall be upon a reasonable basis as determined by the governing body of the city, town or village.

(2) Prior to the exercise of any powers conferred by this section, the governing body shall declare by preliminary resolution its intention to exercise such powers for a stated municipal purpose. Such resolution shall describe generally the contemplated purpose, the limits of the proposed assessment district, the number of instalments in which the special assessments may be paid, or that the number of instalments will be determined at the hearing required under sub. (7), and direct the proper municipal officer or employe to make a report thereon. Such resolution may limit the proportion of the cost to be assessed.

(3) The report required by sub. (2) shall consist of:

(a) Preliminary or final plans and specifications.

(b) An estimate of the entire cost of the proposed work or improvement.

(c) An estimate, as to each parcel of property affected, of:

1. The assessment of benefits to be levied.

2. The damages to be awarded for property taken or damaged.

3. The net amount of such benefits over damages or the net amount of such damages over benefits.

(d) A Statement that the property against which the assessments are proposed is benefited, where the work or improvement constitutes an exercise of the police power. In such case the estimates required under par. (c) shall be replaced by a schedule of the proposed assessments.

* * *

(7) Upon the completion and filing of the report required by sub. (3) the city, town or village clerk shall cause notice to be given stating the nature of the proposed work or improvement, the general boundary lines of the proposed assessment district including, in the discretion of the governing body, a small map thereof, the place and time at which the report may be inspected, and the place and time at which all persons interested, or their agents or attorneys, may appear before the governing body or committee thereof or the board of public works and be heard concerning the matters contained in the preliminary resolution and the report. Such notice shall be published as a class 1 notice, under ch. 985, in the city, town or village and a copy of such notice shall be mailed, at least 10 days before the hearing or proceeding,

to every interested person whose post-office address is known, or can be ascertained with reasonable diligence. The hearing shall commence not less than 10 and not more than 40 days after such publication.

(8) (a) After the hearing upon any proposed work or improvement, the governing body may approve, disapprove or modify, or it may rerefer the report prepared pursuant to subs. (2) and (3) to the designated officer or employe with such directions as it deems necessary to change the plans and specifications and to accomplish a fair and equitable assessment.

(b) If an assessment of benefits be made against any property and an award of compensation or damages be made in favor of the same property, the governing body shall assess against or award in favor thereof only the difference between such assessment of benefits and the award of damages or compensation.

(c) When the governing body finally determines to proceed with the work or improvement, it shall approve the plans and specifications therefor and adopt a resolution directing that such work or improvement be carried out in accordance with the report as finally approved and that payment therefor be made as therein provided.

(d) The city, town or village clerk shall publish the final resolution as a class 1 notice, under ch. 985, in the assessment district and a copy of such resolution shall be mailed to every interested person whose post-office address is known, or can be ascertained with reasonable diligence.

(e) When the final resolution is published, all work or improvements therein described and all awards, compensations and assessments arising therefrom are deemed legally authorized and made, subject to the right of appeal under sub. (12).

* * *

(11) If the cost of the project shall be less than the special assessments levied, the governing body, without notice or hearing, shall reduce each special assessment proportionately and where any assessments or instalments thereof have been paid the excess over cost shall be applied to reduce succeeding unpaid instalments, where the property owner has elected to pay in instalments, or refunded to the property owner.

(12) (a) If any person having an interest in any parcel of land affected by any determination of the governing body, pursuant to sub. (8)(c), (10) or (11), feels himself aggrieved thereby he may, within 90 days after the date of the notice or of the publication of the final resolution pursuant to sub. (8)(d), appeal therefrom to the circuit court of the county in which such property is situated by causing a written notice of appeal to be served upon the clerk of such city, town or village and by executing a bond to the city, town or village in the sum of $150 with 2 sureties or a bonding company to be approved by the city, town or village clerk, conditioned for the faithful prosecution of such appeal and the payment of all costs that may be adjudged against him. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the matter before the governing body, with its decision thereon, and shall transmit the same

with the original or certified copies of all the papers in the matter to the clerk of the circuit court.

(b) Such appeal shall be tried and determined in the same manner as cases originally commenced in such court, and costs awarded as provided in s. 893.80.

(c) In case any contract has been made for making the improvement such appeal shall not affect such contract, and certificates or bonds may be issued in anticipation of the collection of the entire assessment for such improvement, including the assessment on any property represented in such appeal as if such appeal had not been taken.

(d) Upon appeal pursuant to this subsection, the court may, based upon the improvement as actually constructed, render a judgment affirming, annulling or modifying and affirming, as modified, the action or decision of the governing body. If the court finds that any assessment or any award of damages is excessive or insufficient, such assessment or award need not be annulled, but the court may reduce or increase the assessment or award of damages and affirm the same as so modified.

(e) An appeal under this subsection shall be the sole remedy of any person aggrieved by a determination of the governing body, whether or not the improvement was made according to the plans and specifications therefor, and shall raise any question of law or fact, stated in the notice of appeal, involving the making of such improvement, the assessment of benefits or the award of damages or the levy of any special assessment therefor. The limitation provided for in par. (a) shall not apply to appeals

based upon fraud or upon latent defects in the construction of the improvement discovered after such period.

(f) It shall be a condition to the maintenance of such appeal that any assessment appealed from shall be paid as and when the same or any instalments thereof become due and payable, and upon default in making such payment, any such appeal shall be dismissed.

* * *

144.24 Financial assistance program; point source pollution abatement.

* * *

(4) ELIGIBILITY.

* * *

(b)

* * *

3. The amount of reserve capacity for treatment works eligible for grant assistance is limited to that future capacity required to serve the users of the treatment works expected to exist within the service area of the project 10 years from the time the treatment works are estimated to become operational or, in the case of interceptor sewers and associated appurtenances, the estimated date of operation. The department, in consultation with the demographic services center in the department of administration under s. 16.96, shall promulgate rules defining procedures for projecting population used in determining the amount of reserve capacity.

NR 128.06 Fundable capacity. The fundable capacity of treatment works shall be determined as follows.

(2) The fundable capacity for interceptor sewers shall be that capacity necessary to transport the projected flows expected to exist on the date the interceptor is estimated to become operational. The fundable capacity may not include capacity for transporting present and future flows from industrial users as defined in s. NR 128.03 (10).

NR 128.07 Cost of fundable capacity. The estimated cost of step 3 construction of treatment works to transport and/or treat the fundable capacity shall be determined as follows. The facilities plan shall provide parallel cost estimates for treatment works designed to treat the fundable capacity as well as for treatment works designed to treat the actual proposed design capacity. The actual design capacity shall be determined in accordance with ss. NR 110.09 (2)(j) and 110.10(2). The ratio of these costs estimates shall be multiplied by the total step 3 eligible cost to obtain the cost of fundable capacity.

RESOLUTION NO. 11-88

FINAL RESOLUTION LEVYING SPECIAL ASSESSMENTS UNDER SECTIONS 66.60 AND 66.62 OF THE WISCONSIN STATUTES AND SECTION 8.04 OF THE MUNICIPAL CODE FOR CERTAIN PROPERTIES LOCATED WITHIN THE 2005 SEWER SERVICE AREA OF THE VILLAGE OF GERMANTOWN

WHEREAS, the Village Board heretofore determined by preliminary resolution, adopted September 21, 1987, pursuant to secs. 66.60 and 66.62, Stats., sec. 8.04 of the Municipal Code and the police power of the Village of Germantown, to levy and collect special assessments upon certain properties located within the 2005 sewer service area of the Village of Germantown; and

WHEREAS, the Director of Public Works prepared his report of special assessments to be levied, including a schedule of proposed assessments, and filed said report with the Village Clerk; and

WHEREAS, notice of public hearing was given by the Village Clerk as provided by law, as shown by affidavits of mailing and publication and the records on file herein; and

WHEREAS, the Village Board held a public hearing in the Washington High School Gymnasium on March 3, 1988, commencing at 7:30 P.M. and all persons desiring to be heard were heard; and

WHEREAS, the Village Board has considered the evidence and statements of the different parties appearing at said public hearing and has considered said report and

the proposed assessments contained therein and has considered the reasonableness of the basis used in determining the proposed assessments and has discussed all of said matters fully; and

WHEREAS, the Village Board is fully advised in these matters and is now ready to make the final levy of special assessments for the benefits conferred as set forth herein; now, therefore,

BE IT RESOLVED BY THE VILLAGE BOARD OF THE VILLAGE OF GERMANTOWN, WASHINGTON COUNTY, WISCONSIN, THAT:

1. After due consideration of the report of the Director of Public Works in the matter set forth in the preamble hereto, the Village Board hereby finds and determines that the properties set forth in said report, and each of them, are benefitted by the construction of the interceptor sanitary sewer system, and the Board upon such consideration determines that the proposed assessments made were determined upon a reasonable basis.

2. Upon such findings and determinations, said report, including the final project plans and specifications, the statement of final project costs, the statement of benefits, the statement of project financing methods including special assessments, and the schedule of proposed assessments, is hereby approved, except that:

(a) the statement of project financing methods including special assessments is hereby amended and modified to provide that users connected since January 1,

1986, shall receive an additional credit for the debt retirement portion of sewer service charges paid during the first quarter of 1988, computed in the same manner as provided in said statement; and

(b) the schedule of proposed assessments shall be amended and modified to reflect the credits granted under (a) above and to reflect reserve capacity fee payments of $225.00 made through March 31, 1988.

3. The proposed assessments set forth in said report are hereby assessed and levied against said properties as special assessments for the benefits incurred upon them by the interceptor sanitary sewer system project and the Board hereby directs that payment of said special assessments be made as hereinafter provided and orders the owners of said properties to pay such special assessments in the manner hereinafter provided.

4. The proceeds from such special assessments shall be used for paying the costs of the interceptor sanitary sewer system project.

5. The assessments are made pursuant to the police power of the Village of Germantown and sections 66.60 and 66.62, Stats., and sec. 8.04 of the Municipal Code.

6. Each special assessment levied by this resolution shall be a lien upon the property against which it is levied on behalf of the Village of Germantown in accordance with sec. 66.604, Stats.

7. (a) Each owner of property currently served by sewer connected after December 31, 1985, has the option to pay his or her or its reserve capacity assessment in full without interest before September 1, 1988, or in three (3)

equal annual installments, in accordance with sec. 66.54, Stats., with interest thereon at the rate of 9% per annum, such interest to commence as of the date this resolution is adopted and to be computed through December 31 of each year. All assessments will be collected in installments, except such assessments which are paid in full to the Village Treasurer on or before November 1, 1988. The first installment shall be entered in the 1988 tax roll as a special tax on the property upon which the special assessment was levied, and thereafter shall be treated in all respects as any other municipal tax, except as otherwise provided in sec. 66.54, Stats. Hereafter, in each subsequent year, an installment shall in like manner and with like effect be entered in the annual tax roll until all installments have been levied. Each property owner who is paying by installment may prepay his or her or its assessments, together with accrued interest, at any time without penalty. In the event the property owner fails to pay any installment in full at the time it is due, said owner will be deemed delinquent in the payment thereof and his or her or its entire unpaid assessment, together with accrued interest through December 31 of the year said delinquency occurs, shall be extended upon the next succeeding tax roll as a delinquent tax against the property and all proceedings in relation to the collection, return and sale of property for delinquent real estate taxes shall apply to such special assessment, except as otherwise provided by statute.

(b) The reserve capacity assessment on all property not now connected to the sewerage system is deferred in accordance with sec. 66.605, Stats. until such time that application for sewer service is made. Upon

such application, the property owner shall, for each residential equivalency or portion thereof as determined by the Village Engineer, pay the reserve capacity assessment including increases thereof as provided for herein. Said deferred reserve capacity assessment shall be paid in full prior to the issuance of a building permit or, if the property is part of a project which is subject to a developer's agreement entered into pursuant to Chapters 17 or 18 of the Municipal Code, said deferred reserve capacity assessment shall be paid in full prior to the execution of the developer's agreement. The reserve capacity assessment of $1,000.00 shall, as of January 1, 1989 and as of each January 1 thereafter, be automatically increased by 7% of the amount of the assessment during the prior year, unless said annual increase is suspended by the Village Board.

8. All payments hereunder are to be made to the Village Treasurer.

9. The Village Clerk is hereby authorized and directed to publish a copy of this resolution as a Class 1 notice in the Germantown Banner Press and shall mail a copy of this resolution and this statement of the final assessment against his or her or its property to every interested person whose name appears on the assessment schedule and whose post office address is known, or can with reasonable diligence, be ascertained.

10. The Village Clerk is hereby authorized and directed to publish the "Installment Assessment Notice" attached hereto and made a part hereof as a Class 1 notice and to mail a copy thereof to every interested person.

11. This resolution shall become effective upon passage and publication and notice and compliance with secs. 9 and 10 above.

Introduced by Trustee Arthur H. Zabel

Adopted: March 21, 1988

Vote: Aye 8 Nay 0

/s/ Charles Crump
Village President

ATTEST:

/s/ Jane A. Unke
Village Clerk

VILLAGE OF GERMANTOWN

INSTALLMENT ASSESSMENT NOTICE

RESERVE CAPACITY ASSESSMENT

NOTICE IS HEREBY GIVEN that a contract was let for construction of an interceptor sanitary sewer system and that the amount of the Special Assessment therefor has been determined as to each parcel of real estate benefited thereby and a statement of the same is on file with the Village Clerk. Said assessments may be paid in one sum without interest by September 1, 1988, or in 3 equal annual installments, as provided for by § 66.54, WI Stats., with interest thereon at 9.0% per year, as provided in paragraph 7 of the Final Resolution to which this Notice is attached. All assessments will be collected in installments as provided in said paragraph 7, except such assessments which are paid in full to the Village Treasurer on or before November 1, 1988.

Dated at Germantown, WI, this 21st day of March, 1988.

/s/ Jane A. Unke
Village Clerk

* * *

STATEMENT OF FINAL ASSESSMENT

Tax Key No./ID: & Property Address/Description:
Owner:
Mailing Address:
City/State/Zip Code:

Total Final Assessment:
Less Total Credits:
TOTAL BALANCE DUE:

June 21, 1988

1/18/88

REPORT OF THE DIRECTOR OF PUBLIC WORKS FOR SPECIAL ASSESSMENTS ON BENEFITTING PROPERTIES WITHIN THE 2005 SANITARY SEWER SERVICE AREA FOR CONSTRUCTION OF AN INTERCEPTOR SANITARY SEWER SYSTEM

In accordance with Sec. 8.04(3) of the Municipal Code and Resolution No. 23-87 adopted September 21, 1987 by the Village Board, I herewith submit my report on the special assessments proposed to be levied against properties in the 2005 Sewer Service Area of the Village of Germantown as identified in said Resolution No. 23-87 for the sanitary sewer benefits conferred upon such properties by the construction and installation of an interceptor sanitary sewer system serving such properties.

Schedule "A" – Final Project Plans & Specifications (separate cover)

Schedule "B" – Statement of Estimated Final Costs for the Project

Schedule "C" – Statement of Benefits

Schedule "D" – Statement as to Project Financing Methods, Including Special Assessments

Schedule "E" – Project Financing Summary

Schedule "F" – Assessment Procedure

Schedule "G" – Schedule of Proposed Assessments

Report Prepared by:

January 21, 1988
Date

/s/ Lloyd L. Turner
Lloyd L. Turner, P.E.
Director of Public Works Village of Germantown

SCHEDULE B

STATEMENT OF ESTIMATED COSTS FOR THE PROJECT

The total costs of the project are summarized as follows:

1.	Construction contracts let and to be let	$ 8,916,000
2.	Administration, engineering, inspection, legal and contingencies	1,043,900
3.	Treatment plant abandonment	350,000
4.	Net interest during construction through December 31, 1987	344,067
	Total Project Costs	$10,653,967
	Less anticipated Wisconsin Fund Grant	5,413,550
	Net project costs to be financed by Village	$ 5,240,417

SCHEDULE C

STATEMENT OF BENEFITS

Each property listed in Schedule G against which these assessments are proposed has been inspected by the

undersigned. I have also reviewed the Village comprehensive sanitary sewer plan, and have determined from said inspection and reveiw [sic] that each property will be benefitted by the installation of the interceptor sanitary sewer system and connection to the Milwaukee Metropolitan Sewerage District's sewerage system because each property will be served by said interceptor system and said sewerage system, thereby resulting in improved health, safety and convenience, and enhanced economic value to each of the properties.

SCHEDULE D

STATEMENT AS TO PROJECT FINANCING METHODS, INCLUDING SPECIAL ASSESSMENTS

The Village Board has determined that the net estimated project cost to be financed by the Village, i.e., $5,240,417, shall be generated from three principal sources as follows:

1. An 8" equivalency special assessment upon property directly benefitting. (See Resolution No. 4-86 and Report dated August 6, 1986)

2. A current average residential sewer service charge of $399.60, $236.00 of which is currently identified for project debt retirement; said sewer charge was effective January 1, 1986. It is expected that this charge will be subject to periodic, if not annual, adjustments.

3. A reserve capacity special assessment based upon a Residential Equivalent (RCA/RE) upon all property connected after December 31, 1985.

After considering various methods of financing the project, the undersigned has determined that the combination of the above three financing methods is best suited to fairly defray the cost of the project. Further, the RCA/RE assessment method is recommended over an area assessment because the large area involved here would make it difficult, at best, to establish a schedule of benefits based upon what particular parcels would be developed 5, 10 and 20 years in the future. The RCA/RE method eliminates this speculation since only the property which is actually connected will pay the assessment until the property upon which it is levied has actually been connected to the sewerage system.

In arriving at the amount of the RCA/RE, certain assumptions must be made. First, the 8" equivalency assessment will generate $275,193. Second, the debt retirement portion of the current sewer service charge now generates approximately $950,000 annually; it is estimated that this amount will increase approximately 2% annually. Finally, it is estimated that the residential equivalent connections (REC) to the Village sewerage system will average 125 REC's annually.

After taking into account the above factors, I have determined that the initial RCA/RE must be $1,000, and said assessment should be increased 7% annually unless said annual increases are later tolled by the Village Board. The said $1,000 assessment will be subject to certain deductions as specified below.

As part of this determination, I have considered the benefits to sewer users who were connected to the system prior to January 1, 1986 and those users who have and will connect after said date.

The pre-1986 users, through sewer service charges and reserve capacity fee payments in the amount of $225.00 have paid for nearly all of the existing waste water treatment facility and collector system. Sixty percent of the capital costs of the interceptor sewer relating to the pre-1986 users was provided by a Wisconsin Fund Grant. In addition, from January 1, 1986 throught [sic] December 31, 1987, the pre-1986 users will have paid, on average, approximately $472.00 in debt service for this project.

As mentioned above, new users connected since January 1, 1986 should be entitled to certain deductions. First, new users should be credited for the debt retirement portion of sewer service charges paid from the date of connection through December 31, 1987. This credit may be computed by deducting the $80.60 basic charge from the user's actual annual charge and applying to the remainder the average amount representing the new debt portion of that remainder; this amounts to $236.00 per residential equivalent. Any portion of a year is computed by prorating the $236.00 per year from the date of connection.

Secondly, most of the new users have paid a $225.00 reserve capacity fee attributed to the pre-existing collector system. This amount, if actually paid, should also be credited in full. In no event shall the total credits exceed the amount of the assessment.

I have attached a Residential Equivalent Table (per the MMSD cost recovery procedures) which will be used to determine RE's allocations in the future. The equivalent rates are determined and intended to adjust commercial and industrial uses to an equivalent residential use.

Any future user which does not figure under the equivalency table will be determined by the Village based on the average water use of a single family home.

Vacant lands are listed as 1 REC per existing parcel and will be deferred until served; and when served, the charge for each parcel will be levied on the basis of actual use as determined by the tables and methodologies of this report and as approved in the final resolution.

SCHEDULE E

PROJECT FINANCING ESTIMATE

PROJECT DEBT

Project costs to be financed by Village		$ 5,240,417
Less 8" equivalency assessment	$275,193	
Less Excess Contingency Monies	$ 59,583	$ (334,776)
Net project costs to be financed		4,905,641
27 years interest from 1-1-88		7,043,165
Total interceptor debt retirement		$11,948,806

MMSD capital cost (for WPAP)		$10,731,729
Total Project Capital Cost		$22,680,535

* * *

PROJECT DEBT RETIREMENT

Sewer user service charges (capital cost portion)		$12,596,520
RCA/RE:		
257.9 RCA/RE'S from January 1, 1986 @$1,000 (Less debt portion of sewer user service charges paid after January 1, 1986 to date, and less reserve capacity fee, if paid)		$ 177,869
125 RCA/RE'S annually, @$1,000 plus 7% annually 27 years	$9,962,211	
Less Reserve Capacity Fees paid on Vacant Lands	$ 56,065	$ 9,906,146
Total RCA/RE Assessments		$10,084,015
Total Project Debt Retirement		$22,680,535